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In the Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

[Additional Litigants Listed on Inside Cover]

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND FOURTH CIRCUITS

BRIEF FOR THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

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CLINCHFIELD COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND ALBERT C. DAYTON

QUESTION PRESENTED

Whether persons who do not have black lung disease or are not disabled by it are entitled to benefits under the Black Lung Benefits Act.

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OPINIONS BELOW

The opinion of the Third Circuit in *Pauley* v. *Bethenergy Mines, Inc.* (89-1714 Pet. App. 1-19) is reported at 890 F.2d 1295. The corresponding opinions of the Benefits Review Board (89-1714 Pet. App. 20-22) and the administrative law judge (Pet. App. 23-41) are unreported.

The opinion of the Fourth Circuit in *Clinchfield Coal Co.* v. *Director, OWCP* (90-113 Pet. App. 4a-16a) is reported at 895 F.2d 178. The corresponding opinions of the Benefits Review Board (90-113 Pet. App. 17a-19a) and the administrative law judge (Pet. App. 20a-32a) are unreported.

The opinion of the Fourth Circuit in *Consolidation Coal Co.* v. *Director, OWCP* (90-114 Pet. App. 2-7) is reported at 895 F.2d 173. The corresponding opinions of the Benefits Review Board (90-114 Pet. App. 8-13) and the administrative law judge (Pet. App. 14-27) are unreported.

JURISDICTION

The Third Circuit entered judgment in *Pauley* v. *Bethenergy Mines, Inc.* on December 7, 1989, and denied a petition for rehearing on February 6, 1990. 89-1714 Pet. App. 42-43. The petition for a writ of certiorari was filed on May 7, 1990.

The judgments of the Fourth Circuit in *Clinchfield Coal Co.* v. *Director, OWCP* and *Consolidation Coal Co.* v. *Director, OWCP* were both entered on February 5, 1990, and orders denying petitions for rehearing in both cases were entered on April 20, 1990.

90-113 Pet. App. 1a; 90-114 Pet. App. 1. Petitions for writs of certiorari were filed in both cases on July 17, 1990.

On October 29, 1990, the Court granted the petitions and consolidated the three cases. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) in all three cases.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution; Sections 402(f) and 411(c) of the Black Lung Benefits Act of 1972, 30 U.S.C. 902(f) and 921(c); the Department of Health, Education, and Welfare's presumption regulation, 20 C.F.R. 410.490; and the Department of Labor's presumption regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act,[1] 30 U.S.C. 901 *et seq.*, pro-

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150. It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, and the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635. See also the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313, and the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330-446 (both amending trust fund tax provisions).

vides benefits "to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment."[2] *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 108 (1988), citing *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987); see 30 U.S.C. 901(a). Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under Part B of the Act, which established a federally financed program.[3] Disability claims filed after that date are considered by the Department of Labor (DOL) under Part C of the Act, which established a program financed by the coal industry. *Sebben*, 488 U.S. at 109-110; 30 U.S.C. 925, 931-932.

a. *The Part B Program.* In Section 411(c) of the Act, 30 U.S.C. 921(c), Congress established a number of presumptions to govern the Part B program. The first presumption provides that in the case of a claimant suffering from pneumoconiosis who worked for at least ten years as a coal miner, "there shall be

[2] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust, cotton fibers, or asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment.

[3] The Department of Health, Education, and Welfare is no longer in existence. Its principal functions are now divided between the Department of Health and Human Services and the Department of Education. As indicated in text, however, administrative functions under the Black Lung Benefits Act are now performed by the Department of Labor.

a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). The second provision sets out a similar causation presumption with respect to miners with at least ten years' experience who died from a respiratory disease. 30 U.S.C. 921(c)(2). The third provision establishes an irrebuttable presumption—the only such presumption governing claims adjudication—that miners presenting x-ray, biopsy, or autopsy evidence showing complicated pneumoconiosis are entitled to benefits.[4] 30 U.S.C. 921(c)(3).

The fourth statutory presumption, set out in Section 411(c)(4) of the Act, was added to the Act in 1972. It provides a rebuttable presumption of entitlement to benefits for miners with at least 15 years of coal mine experience who cannot demonstrate complicated pneumoconiosis by means of x-ray, biopsy, or autopsy evidence, but who present "other evidence demonstrat[ing] the existence of a totally disabling respiratory or pulmonary impairment." 30 U.S.C. 921(c)(4). The provision further states that "[t]he Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory

[4] While simple pneumoconiosis is "seldom productive of significant respiratory impairment," complicated pneumoconiosis "usually produces significant pulmonary impairment and marked respiratory disability." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (footnote omitted). In *Turner Elkhorn Mining*, this Court rejected the coal industry's constitutional challenge to the irrebuttable presumption set out in Section 411(c)(3). The Court noted that "it was precisely this advanced and progressive stage of the disease that Congress sought most certainly to compensate," and held that it was not irrational for Congress to conclude that any miner with the advanced stage of the disease should receive benefits. 428 U.S. at 23.

or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Ibid.*[5]

Shortly after enactment of the 1972 amendments that included Section 411(c)(4), the Secretary of HEW promulgated a presumption regulation, 20 C.F.R. 410.490, setting out adjudicatory rules for Part B claims. The regulation was drafted in a most confusing manner. See *Sebben*, 488 U.S. at 109. Subsection (b), which governs invocation of the presumption, has three subparts. Subsection (b)(1) provides that a claimant must present either (i) x-ray, biopsy, or autopsy evidence showing the existence of pneumoconiosis, or (ii) "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment," ventilatory test scores showing the presence of a chronic respiratory or pulmonary disease. Subsection (b)(2) calls for proof that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456)."[6] Subsection (b)(3) provides that "a

[5] The fifth and last presumption set out in Section 411(c) provides that certain survivors of deceased persons who worked in coal mines for at least 25 years were entitled to benefits unless it was shown that the miners were not at least partially disabled from pneumoconiosis at the time of their death. 30 U.S.C. 921(c)(5). Congress repealed this presumption and the presumptions in Section 411(c)(2) and (c)(4) in 1981. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, § 202(b), 95 Stat. 1643.

[6] The regulations cross-referenced in subsection (b)(2) provide that "it will be presumed, in the absence of persuasive evidence to the contrary," that pneumoconiosis arose out of coal mine employment in the case of a claimant who worked in coal mines for ten years or more, while in cases involving miners with less experience, claimants "must submit the evidence necessary to establish that the pneumoconi-

miner who meets the medical requirements in paragraph (b)(1)(ii) of this section" (the provision relating to ventilatory test scores) is presumed to be entitled to benefits "if he has at least 10 years of the requisite coal mine employment."

Subsection (c) of HEW's regulation provides for rebuttal of the presumption. It states that the claimant is not entitled to benefits "if: (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or (2) Other evidence, including physical performance tests * * *, establish[es] that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1))."[7]

b. *The Part C program.* Initially, Part C claims were adjudicated by DOL under standards established by HEW that were more stringent in certain key respects than those applied to Part B claims.[8] In

osis" on which the claim is based "arose out of employment in the nation's coal mines." 20 C.F.R. 410.416, 410.456.

[7] The regulation cross-referenced in HEW's rebuttal provisions states that a miner "shall be considered totally disabled due to pneumoconiosis" if the disease "prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged." 20 C.F.R. 410.412(a)(1).

[8] Most significantly, the ventilatory test score standards used by DOL to determine whether miners were disabled were much more stringent than those in HEW's presumption regulation. See *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 353 (statement of Bedford W. Bird), 398 (statements of John Rosenberg and Nancy Snyder) (1974).

1978, Congress gave DOL authority to promulgate permanent regulations to govern the Part C program. It also provided in Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), that the "[c]riteria" applied to claims filed before those permanent regulations were in place "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." The permanent regulations took effect on April 1, 1980. Thus, claims filed before that date are subject to the requirement set out in Section 402(f)(2) of the Act, and therefore must be adjudicated under criteria no more restrictive than those applied to Part B claims.[9]

In response to Section 402(f)(2), the Secretary of Labor issued an interim presumption regulation, 20 C.F.R. 727.203. The invocation portion of DOL's regulation is similar to HEW's regulation in that it provides that claimants may use (1) x-ray, biopsy, or autopsy evidence, or (2) ventilatory study scores identical to those in HEW's regulation. 20 C.F.R. 727.203(a)(1) and (2). DOL's regulation goes beyond HEW's in allowing the presumption to be triggered by (3) blood-gas studies, (4) other medical evidence, including a physician's opinion, and (5) in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). The invocation portion of DOL's regulation also differs from HEW's in that it contains no provision directly comparable to subsection (b)(2), the provision stating that, in

[9] About 2,000 to 3,500 claims subject to Section 402(f)(2) are still pending. The lifetime cost of a single black lung claim has been estimated at between $118,316 and $185,656. See Employment Standards Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979*, at 32 (1980).

order to invoke HEW's presumption, the claimant had to show that "[t]he impairment * * * arose out of coal mine employment."[10]

Like HEW's regulation, DOL's regulation provides that the presumption may be rebutted by proof that a claimant (1) is doing his usual coal mine work or work comparable to it or (2) is capable of doing such work.[11] 20 C.F.R. 727.203(b)(1) and (2). Unlike HEW's regulation, DOL's regulation expressly allows rebuttal by proof that (3) "the total disability or death of the miner did not arise in whole or in part from coal mine employment" or (4) "the miner does not, or did not, have pneumoconiosis." 20 C.F.R. 727.203(b)(3) and (4). Those two rebuttal provisions are very similar to the provisions set out in Section 411(c)(4) of the Act, which provides that the presumption established in that provision may be rebutted by evidence that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of,

[10] DOL's regulation also originally differed from HEW's in that it provided that all claimants must have worked in coal mines for at least ten years in order to invoke the presumption. Under HEW's regulation, a claimant presenting x-ray, biopsy, or autopsy evidence of pneumoconiosis could invoke the presumption with less than ten years of coal mine work. This Court held in *Sebben* that in this respect DOL's regulation was more restrictive than HEW's, and hence invalid.

[11] The second of DOL's rebuttal provisions differs slightly from HEW's in that it provides that a miner's ability to do his usual coal mine work or work comparable to it is to be assessed "[i]n light of all relevant evidence." 20 C.F.R. 727.203(b)(2). HEW's regulation provides that "[o]ther evidence, including physical performance tests" where available and appropriate, may be used to rebut the presumption. 20 C.F.R. 410.490(c)(2).

or in connection with, employment in a coal mine." [12] 30 U.S.C. 921(c)(4).

2. *The three consolidated cases.* In *Pauley* v. *Bethenergy Mines*, which arose in the Third Circuit, the claimant was able to invoke the presumption because the evidence showed that the miner had pneumoconiosis, but the presumption was rebutted under DOL's third method because the evidence also showed that the miner's disability "did not arise even in part out of coal mine employment." 89-1714 Pet. App. 13. The court of appeals held that the third rebuttal provision is not invalid under Section 402(f)(2), and thus the claimant was not entitled to benefits. In the *Taylor* and *Dayton* cases, which arose in the Fourth Circuit, the claimants were able to invoke the presumption but it was rebutted under DOL's fourth method by evidence that the miners did not have pneumoconiosis. However, the court of appeals held that DOL's fourth rebuttal method is invalid under Section 402(f)(2) because, in the court's view, the question whether a claimant has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*.

a. *Pauley* v. *Bethenergy Mines.* In 1978, John Pauley applied for black lung benefits. 89-1714 Pet. App. 24-25. An ALJ concluded that Pauley had properly invoked the presumption of eligibility for benefits based on his 30 years of coal mining and on x-ray

[12] Like HEW's presumption regulation, DOL's regulation provides for additional adjudication under a set of permanent regulations for claimants who do not establish eligibility under the applicable presumption regulation. 20 C.F.R. 410.490(e), 727.203(d). For Part C claimants, these permanent regulations are either HEW's permanent regulations or DOL's permanent regulations, depending on when the claim was adjudicated. See *Sebben*, 488 U.S. at 111.

evidence showing that he had pneumoconiosis. *Id.* at 4, 36. Bethenergy Mines conceded the existence of the disease and its relationship to coal mining. *Ibid.* But it sought to rebut the presumption under DOL's third rebuttal provision by showing that, although Pauley was disabled, his disability did not arise in whole or in part from the disease. The ALJ concluded that the operator had succeeded in rebutting the presumption since the operator had shown that "pneumoconiosis is not a contributing factor in claimant's disability." *Id.* at 38. Rather, the medical evidence showed that Pauley was disabled due to arthritis and residual hemiparesis resulting from a stroke. *Id.* at 36-37. However, the ALJ went on to hold that the third rebuttal provision in DOL's regulation is contrary to Section 402(f)(2) because there is no comparable rebuttal provision on the face of HEW's regulation. Accordingly, the ALJ held that "the claimant is entitled to benefits." Pet. App. 40. The Benefits Review Board affirmed. *Id.* at 20-22.[13]

The Third Circuit reversed the award of benefits. 89-1714 Pet. App. 1-19. It began by noting that "[t]he purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal

[13] John Pauley died in December 1988, while the case was pending before the Benefits Review Board. On August 14, 1990, the Board substituted his widow, petitioner Harriet Pauley, as the claimant in this case. See 89-1714 Fed. Resp. Supp. Br. We believe that Mrs. Pauley is the proper party in this case because her husband had been found to be eligible for benefits when he died (89-1714 Pet. App. 23-41) and she became eligible for those benefits as his survivor without having to refile or otherwise validate the claim. See 30 U.S.C. 932(*l*); *Rosebud Coal Sales Co.* v. *Weigand*, 831 F.2d 926, 927-928 (10th Cir. 1987); 20 C.F.R. 725.212.

mine employment," and that the ALJ had made unchallenged findings that "Pauley's disability did not arise even in part out of coal mine employment." *Id.* at 12, 13. It then determined that Section 402(f)(2) did not require an award of benefits in that circumstance, for two reasons. First, the court did not think that Congress intended Section 402(f)(2) to preclude proof that a claimant did not have pneumoconiosis or was not disabled by the disease. Alternatively, although there was "no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education and Welfare," the court did not believe that HEW would have awarded benefits under the facts of this case. *Id.* at 17a. Thus, the court concluded, the same result was required under both regulations, so that DOL's regulation was not more restrictive than HEW's.

b. *Clinchfield Coal Co.* v. *John Taylor.* In 1976, John Taylor applied for black lung benefits. 90-113 Pet. App. 5a, 24a. An ALJ found that Taylor had properly invoked the presumption of eligibility for benefits based on his 12 years of coal mining and on blood gas tests showing an impairment in the transfer of oxygen from his lungs to his blood. *Id.* at 6a, 24-26a. The ALJ also concluded, however, that Clinchfield Coal had rebutted the presumption under DOL's third and fourth rebuttal methods by proving that Taylor was not totally disabled and, indeed, did not have pneumoconiosis. 90-113 Pet. App. 31a. The ALJ relied on negative x-ray evidence, non-qualifying ventilatory test scores, and certain medical reports that he found more persuasive than conflicting x-ray readings and other medical reports. That evidence supported the conclusion that Taylor suffered from chronic bronchitis caused by obesity and 30 years of cigarette smoking rather than from pneumoconiosis. *Id.* at 27a-31a. Accordingly, the ALJ denied benefits. *Id.* at 31a. The Benefits Review Board affirmed, concluding that the ALJ's decision was supported by substantial evidence. *Id.* at 18a-19a.

A divided Fourth Circuit reversed. 90-113 Pet. App. 4a-16a. It first dismissed the argument that DOL's regulation cannot be considered "more restrictive" than HEW's regulation as applied to Taylor because (a) he invoked the presumption based on blood gas studies, a method of invocation available under DOL's regulation but not HEW's and (b) Taylor could *not* invoke the presumption under HEW's regulation on the basis of his x-rays and ventilatory test scores. *Id.* at 11a, 27a. The court thought it "a matter of indifference" how the claimant invoked the presumption of eligibility and therefore did not accept "any argument that the rebuttal provisions must be pegged to the invocation provisions." *Id.* at 11a.

The court then determined that DOL's third and fourth rebuttal methods "permit rebuttal of more elements of entitlement to benefits than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability." 90-113 Pet. App. 12a. The court held that the additional methods violate Section 402(f)(2). The court then qualified its opinion by reading HEW's regulation as allowing a rebuttal method "similar" to DOL's third method, which authorizes rebuttal by proof that the claimant's disability was not caused by coal mine employment. 90-113 Pet. App. 14a. The court remanded the case for further consideration of that issue. *Id.* at 14a-15a.[14]

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[14] The Fourth Circuit later retreated from the suggestion that HEW's regulation provided a method of rebuttal similar

Chief Judge Ervin dissented. 90-113 Pet. App. 15a-16a. He agreed with the majority that its decision conflicted with the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (1989), and also noted a conflict with the Third Circuit's decision in *Pauley*. In his view, the decisions of those circuits upholding Labor's rebuttal provisions did "less violence to congressional intent, and avoid[ed] both upsetting the statutory scheme and raising due process problems." 90-113 Pet. App. 16a.

c. *Consolidation Coal Co.* v. *Albert Dayton*. In 1979, Albert Dayton applied for black lung benefits. 90-114 Pet. App. 3. An ALJ found that Dayton had properly invoked the presumption of eligibility for benefits based on his 17 years of coal mining and on ventilatory test scores showing a chronic pulmonary condition. *Id.* at 15, 20. The ALJ also concluded, however, that Consolidation Coal had rebutted the presumption under DOL's second rebuttal method by proving that Dayton's pulmonary impairment was not totally disabling. *Id.* at 20-24. In addition, the ALJ concluded that the medical evidence showed that Dayton did not have pneumoconiosis, so that the presumption was also rebutted under DOL's fourth method. *Id.* at 24-26. Accordingly, the ALJ denied Dayton's application for benefits. *Id.* at 27.

The Benefits Review Board affirmed. 90-114 Pet. App. 8-13. Like the ALJ, the Board concluded that the medical evidence showed that Dayton's pulmonary condition was unrelated to coal dust exposure, but was instead related to his smoking history and to other ailments. It accordingly held that the employer had rebutted the presumption under DOL's fourth method. *Id.* at 11-12. The conclusion that Dayton did not have pneumoconiosis, the Board added, would justify rebuttal under HEW's regulation as well. *Id.* at 12 n.2. The Board found it unnecessary to decide whether the ALJ had correctly concluded that the employer had rebutted the presumption under DOL's second method. *Id.* at 10 n.1.

The Fourth Circuit reversed. 90-114 Pet. App. 2-7. Relying on its decision in *Taylor* v. *Clinchfield Coal Co.* (No. 90-113), the court held that Section 402(f)(2) required Dayton's claim to be adjudicated "under the less restrictive rebuttal standards" of HEW's regulation. 90-114 Pet. App. 5. Under HEW's standards, the court stated, DOL's fourth method "should not have been available to the coal operator." *Id.* at 6. Thus, in the court's view, the finding that Dayton does not have pneumoconiosis "is superfluous and has no bearing on the case." *Id.* at 7 n.*. The court recognized that this result posed an "interesting" due process question, but decided not to consider the constitutional implications of its decision because only the Director of the Office of Workers' Compensation Programs, and not the coal mine operator, had raised the issue. *Id.* at 6.

SUMMARY OF ARGUMENT

The purpose of the Black Lung Benefits Act is to provide benefits "to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). The ALJs found that neither Taylor nor Dayton has pneumoconiosis. Pauley had simple pneumoconiosis

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to Labor's third method. In an unpublished decision, the court concluded that the suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending, No. 90-172 (filed July 25, 1990).

and was not able to do coal mine work, but his disability was not caused, even in part, by his pneumoconiosis. Accordingly, none of the claimants has shown that he is entitled to benefits.

1. By providing for rebuttal by proof that a miner does not have pneumoconiosis, or by proof that the miner's disability did not arise from coal mine employment, DOL's regulation is not "more restrictive" than HEW's within the meaning of Section 402 (f)(2). While it is not clear exactly how HEW applied its opaque regulation, the Third Circuit correctly concluded that HEW would not have awarded benefits on the facts of these cases. A contrary conclusion—that HEW awarded benefits to miners who did not have pneumoconiosis or who were not disabled by it—would mean that the agency was using federal funds to pay benefits to claimants who were not entitled to benefits under the Act. It should not be presumed that HEW was violating the law in that manner.

Analysis of HEW's regulation confirms that claimants such as those in these cases would not have obtained benefits under the Part B program. Subsection (b)(2) of HEW's regulation states that the claimant is required to show that his impairment "arose out of coal mine employment." That provision is similar to DOL's third rebuttal provision, which authorizes rebuttal where the disability "did not arise in whole or in part out of coal mine employment." With respect to DOL's fourth rebuttal provision, HEW may have also relied on subsection (b)(2) of its regulation in concluding that miners who did not have pneumoconiosis were not entitled to benefits. Although "pneumoconiosis," when used as a medical term, refers to a disease of the respiratory system that may be caused by exposure to a variety of substances, as defined in the Act the term refers to "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). The requirement in subsection (b)(2) of HEW's regulation that the "impairment * * * arose out of coal mine employment" parallels the statutory definition of "pneumoconiosis." Thus, under a reasonable reading of subsection (b)(2), a claimant who did not have pneumoconiosis would not qualify for benefits.

2. However HEW's regulation was applied, it is clear that Congress, in enacting Section 402(f)(2), did not intend to foreclose inquiry into whether a miner has pneumoconiosis and is disabled by it. That Section did not direct DOL to apply HEW's regulation; rather, it directed DOL to apply criteria no more restrictive than those applicable to Part B claimants. The rebuttable presumption set out in Section 411(c)(4) expressly provided for rebuttal by evidence that the miner did not have pneumoconiosis or that his impairment, however disabling, was not caused by coal mine work. Surely the Congress that enacted Section 402(f)(2) would have assumed that the rebuttal methods set out in Section 411(c)(4) of the Act were available under the Part B program, even if HEW did not actually apply them. In addition, Congress had enacted a *rebuttable* presumption in Section 411(c)(1) providing that pneumoconiosis was presumed to have been caused by coal mine employment where a miner had ten years of coal mine experience, yet the claimants in this case contend that HEW applied *irrebuttable* causation presumptions.

Moreover, the Congress that enacted Section 402 (f)(2) in 1978 was undoubtedly aware of this Court's 1976 decision in *Usery* v. *Turner Elkhorn Mining Co.*,

428 U.S. 1. In that case this Court placed a gloss on Section 411(c)(3), the Part B provision establishing an irrebuttable presumption in favor of claimants proving the existence of complicated pneumoconiosis. The Court stated that although Section 411(c)(3) "does not explicitly provide that the disease must be one arising out of employment in a coal mine," it was clear under the Act "that an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." 428 U.S. at 22 n.21. Congress reasonably would have thought that such a requirement applied generally under the Part B program.

A serious constitutional question would be presented by a holding that coal mine operators must pay black lung benefits in cases where they are foreclosed from presenting evidence that the miner does not have black lung disease or is not disabled by it. Cf. *Turner Elkhorn Mining*, 428 U.S. at 35. Such a holding should be avoided where, as here, it is not mandated by the statute.

Less than two months after Section 402(f)(2) was enacted, DOL proposed the regulation that the claimants have challenged. DOL's regulation set out two rebuttal methods that closely track those in HEW's regulation and two that closely track those in Section 411(c)(4). That construction of this complex statute is, at the least, reasonable. Moreover, it is plainly preferable to the claimants' alternative construction, under which black lung benefits must be awarded to claimants who are not disabled by black lung disease.

ARGUMENT

THE "CRITERIA" SET OUT IN THE REBUTTAL PROVISIONS OF THE DEPARTMENT OF LABOR'S PRESUMPTION REGULATION ARE NOT MORE RESTRICTIVE THAN THOSE APPLICABLE UNDER THE PART B PROGRAM

This Court has recognized that disability benefits are payable to a miner under the Black Lung Benefits Act "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.*, 488 U.S. at 141; see also *Sebben*, 484 U.S. at 108. That recognition follows from the declaration of purpose in Section 401(a) of the Act, which states that "Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines," and that "[i]t is, therefore, the purpose of this subchapter to provide benefits * * * to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a).

In light of this purpose, it should be plain, despite the complexity of the statute and its implementing regulations, that the Fourth Circuit erred when it held that the question whether a claimant has pneumoconiosis "is superfluous and has no bearing on the case." 90-114 Pet. App. 7 n.*. Rather, if neither Dayton nor Taylor has pneumoconiosis (called "black lung disease" when caused by exposure to coal mine dust), neither is entitled to black lung benefits. Similarly, since "pneumoconiosis is not a contributing fact in [Pauley's] disability" (89-1714 Pet. App. 5), the Third Circuit was correct in concluding that he was not entitled to benefits.

A. None Of The Claimants Has Shown That He Would Have Obtained Benefits Under The Part B Program

Section 411(a) of the Act, the initial provision in Part B, implements the Act's declaration of purpose by directing the Secretary of Health, Education, and Welfare "to make payments of benefits in respect of total disability of any miner due to pneumoconiosis." 30 U.S.C. 921(a). Nowhere in Part B is HEW authorized to make payments to any miner who does not have pneumoconiosis or whose disability is not due, even in part, to pneumoconiosis. Nevertheless, in arguing that DOL's presumption regulation imposes more restrictive criteria than those governing the Part B program, the claimants implicitly urge that they would have obtained benefits under Part B. More specifically, they urge that they would have qualified for benefits under HEW's presumption regulation. Such a contention is necessary to the claimants' case: if they would not be entitled to benefits under HEW's regulation, the standards established by DOL are not more restrictive as applied to them than are HEW's standards under Part B.[15]

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[15] Taylor most clearly fails to satisfy this threshold requirement. He invoked the presumption under DOL's regulation by presenting blood gas studies showing that he suffered from a respiratory impairment. That method of invocation was not available under HEW's regulation, and the ALJ concluded that Taylor's x-rays and ventilatory study scores were not sufficient to invoke the presumption under HEW's regulation. 90-113 Pet. App. 27a. Since either x-ray evidence or ventilatory study scores must be used to invoke HEW's presumption, Taylor would not have qualified for benefits under the presumption regulation governing the Part B program. Thus, the result under HEW's regulation would be the same as the result under DOL's regulation—Taylor does not qualify for benefits. Although the Fourth Circuit considered this fact irrelevant—summarily rejecting "any argument that the rebuttal provisions must be pegged to the invocation provisions" (*id.* at 11a)—we do not see how Taylor plausibly can argue that DOL's regulation is more restrictive than HEW's as applied to him.

In Pauley's view, under HEW's presumption regulation a miner who establishes that he has pneumoconiosis and that he worked in a coal mine for at least ten years must be awarded benefits if he is totally disabled, even if it is shown that the miner's disability is not caused, in whole or in part, by pneumoconiosis. Similarly, in the view of Dayton and Taylor, under HEW's regulation a miner who invokes the presumption and who is totally disabled must be awarded benefits even if it is shown that he does not have pneumoconiosis. As the Third Circuit stated, "there is no case law indicating how the rebuttal provisions of 20 C.F.R. § 410.490 were applied by the Department of Health, Education and Welfare" (89-1714 Pet. App. 17) and, as this Court has recognized, HEW's regulation was "drafted in a most confusing manner" (*Sebben*, 488 U.S. at 109). Notwithstanding these difficulties, we believe there is a sufficient basis to determine that HEW would not have awarded benefits to claimants if it concluded that the claimants did not have pneumoconiosis or were not disabled by it.

In our view, subsection (b)(2) of HEW's regulation includes the conditions in DOL's third and fourth rebuttal methods. Subsection (b)(2) states that in order to invoke the presumption, the claimant must show that "[t]he impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment." That provision is comparable to DOL's third rebuttal method, since subsection (b)(2) speaks of an impairment that "arose out

of coal mine employment" while DOL's third rebuttal provision authorizes the coal mine operator to show that the miner's disability "did not arise in whole or in part out of coal mine employment." [16]

With respect to DOL's fourth rebuttal method, we believe that, under subsection (b)(2) of its regulation, HEW would, and properly should, have rejected a claim where the evidence showed that the miner did not have pneumoconiosis. Although "pneumoconiosis," when used as a medical term, refers to a respiratory condition that may be caused by exposure to a variety of substances—including cotton fibers and asbestos (see note 2, *supra*)—Congress defined "pneumoconiosis" to mean "a chronic dust disease * * * arising out of coal mine employment." 30 U.S.C. 902(b). Subsection (b)(2) of HEW's regulation tracks the

[16] HEW issued a supplement to its Coal Miner's Benefits Manual in 1972, shortly after it promulgated its regulation, to guide claims adjudicators. (We have lodged a copy of the supplement with the Clerk of the Court and are serving a copy of the supplement on the other parties.) While the manual, like the regulation, is not crystal clear, it shows that at least some miners were barred from invoking the presumption if they could not show that they were disabled by coal mine work. Where a claimant presented x-ray evidence of pneumoconiosis and had fewer than ten years of coal mine experience, the manual made explicit that "the burden of proof rests on the claimant to establish that his pneumoconiosis arose out of" coal mine experience. Section IB6(d). In addition, a miner who presented qualifying ventilatory test scores and had ten years of coal mine experience "was *presumed* to be totally disabled due to pneumoconiosis arising out of coal mine employment," the manual said, "*if* * * * there is no evidence that *rebuts* such a finding." *Ibid.* (emphasis added). Thus, the manual contemplated (somewhat paradoxically) that "rebut[tal]" would be allowed in some circumstances *before* the presumption was invoked.

statutory definition of "pneumoconiosis" in requiring proof of an impairment that "arose out of coal mine employment." [17] Thus, the most plausible reading of subsection (b)(2) is that a miner who did not have pneumoconiosis could not invoke HEW's presumption.[18]

The statute provides with respect to the Part B program that if a miner had ten years of coal mine experience, "there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). And that presump-

[17] Subsection (b)(2) may naturally be read to do the work of both DOL's third and fourth rebuttal methods because those methods overlap to a considerable extent. In most cases, proof that a miner does not have pneumoconiosis will also establish that his disability does not arise out of coal mine employment. That is particularly clear since the statutory definition of "pneumoconiosis" (and the regulatory definition as well (see 20 C.F.R. 410.401(b)(1)) restricts the term to lung diseases arising out of coal mine employment.

[18] As noted above, HEW's benefits manual (see note 16, *supra*) stated that the presumption of entitlement to benefits could be invoked in certain circumstances only if "there is no evidence that rebuts" a finding that the claimant is totally disabled due to pneumoconiosis. Section IB6(d). Evidence showing that a claimant does not have pneumoconiosis necessarily shows that he is not disabled by it. In addition, the manual set out a third *rebuttal* provision stating that a claimant was not entitled to benefits where "[b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists." Section IB6(e)(3). While that section of the manual assumes that the presumption has been invoked, it shows, contrary to the arguments of Taylor and Dayton, that in some circumstances HEW would deny benefits to persons who did not have pneumoconiosis even though they somehow had invoked the presumption. Moreover, it shows that HEW did not construe the rebuttal methods set out on the face of its regulation as the only available methods of rebuttal.

tion is restated in HEW's regulations. See 20 C.F.R. 410.416, 410.456; cf. 20 C.F.R. 410.490(b)(3). But while the ten-year rule is a presumption that is *rebuttable*, the claimants ask this Court to conclude that HEW converted the presumption into one that is *irrebuttable*. In our view, the ten-year presumptions found elsewhere in the statute and HEW's regulations serve to shift the burden of proof to the party contesting entitlement with respect to the causation issues once the claimant makes the requisite showing, but under subsection (b)(2) the operator still has the opportunity to negate the presumption by proving that the claimant did not have pneumoconiosis or that his disability was not caused by the disease.[19]

HEW's presumption regulation, as we have readily acknowledged, is not a model of clarity. However, adoption of the claimants' interpretation would compel the conclusion that HEW was violating the law by paying federal funds to claimants who were not entitled to benefits because they were not totally disabled due to pneumoconiosis arising out of coal mine employment. As the Third Circuit stated, "it seems perfectly evident that no set of regulations * * * may provide that a claimant who is statutorily barred from recovery may nevertheless recover." 89-1714 Pet. App. 13. Because the Court presumes that federal agencies "act properly and according to law"

[19] The Third Circuit concluded that HEW's regulation allowed for proof on rebuttal that a miner did not have pneumoconiosis or was not disabled as a result of coal mine employment. 89-1714 Pet. App. 17. Some support for this alternative theory is furnished by the provision in HEW's manual that the presumption of entitlement to benefits "may be rebutted if: * * * (3) Biopsy or autopsy findings clearly establish that no pneumoconiosis exists." Section IB6(e). See note 18, *supra*.

(*FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965)), it should not conclude that HEW was paying benefits to claimants who did not qualify unduer the Act. The Court should determine instead that HEW would not have awarded benefits to such claimants and that DOL's regulation is therefore not more restrictive than HEW's regulation.

B. Section 402(f)(2) Does Not Bar A Party Contesting Entitlement From Showing That A Claimant Does Not Have Pneumoconiosis Or Is Not Disabled By The Disease

Even if HEW would have refused to consider evidence showing that a claimant did not have pneumoconiosis or was not disabled by it, Section 402(f)(2) should not be construed to require DOL to follow that course. Section 402(f)(2) does not direct DOL to adopt HEW's regulation as HEW applied it, but instead states that the "[c]riteria" applied by DOL to claims filed before DOL promulgated final regulations "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, the question is what criteria Congress understood to apply to Part B claims, not what criteria HEW actually applied.[20] In our view, Congress must have acted on the understanding that Part B claims were not allowed when the evidence showed that the

[20] The point may be illustrated by a hypothetical case involving corruption. If one criterion actually applied by HEW were that benefits were awarded to any claimant who bribed a claims adjudicator, it would certainly not be appropriate to conclude that Congress intended to compel DOL to apply the same criterion.

claimant did not have pneumoconiosis or was not disabled by it.[21]

1. The Congress that enacted Section 402(f)(2) was aware of the purposes of the Black Lung Benefits Act, and would surely have been surprised to learn—if it was true—that black lung benefits were being awarded under Part B to persons who were not disabled by black lung disease. No reasonable construction of Section 402(f)(2), and nothing in its history or background, support the conclusion that Congress intended to compel DOL to award benefits to such persons.

First, the regulatory criteria that Congress specifically addressed in enacting Section 402(f)(2) were the ventilatory test scores set out in HEW's presumption regulation. See note 8, *supra*. Those scores were incorporated, verbatim, by DOL. 20 C.F.R. 727.203(a)(2).

Second, Congress would have understood that the statutory presumptions set out in Part B of the Act

[21] The Third Circuit noted that Section 402(f)(2) is part of the definition of "total disability" and concluded that because the rebuttal provisions at issue relate to causation matters, and not directly to whether the claimant is totally disabled, the restriction in Section 402(f)(2) is inapplicable. 89-1714 Pet. App. 17. That conclusion may be difficult to reconcile with this Court's decision in *Sebben*. In that case, the Court noted that the contention that "'criteria' means total disability criteria * * * has considerable merit." 488 U.S. at 114. However, the Court went on to conclude that "to increase the requirements for the presumption of causality is necessarily to increase the requirements for the presumption of total disability" because HEW's regulation provided that "if certain evidence of the first two elements of entitlement (pneumoconiosis and causation) was established, the third element (total disability) *would automatically be presumed*." *Ibid.*

were applied to Part B claims. One of those is the presumption—expressly made *rebuttable*—that in the case of a miner with ten years of coal mine employment, "his pneumoconiosis arose out of such employment." 30 U.S.C. 921(c)(1). Pauley contends, however, that because he showed that he had pneumoconiosis and that he worked in coal mines for more than ten years, it is *irrebuttably* presumed that he is disabled from coal mine work. And Taylor and Dayton contend that because they presented evidence of a respiratory disability and worked in coal mines for more than ten years, it is *irrebuttably* presumed that they had pneumoconiosis. As noted, we doubt that HEW actually applied its regulation in that manner. But if it did, it was acting beyond its statutory authority. Nothing in the Act establishes such irrebuttable presumptions.

Third, another relevant statutory presumption, set out in Section 411(c)(4), provides that a miner presenting "evidence demonstrat[ing] the existence of a totally disabling respiratory or pulmonary impairment" is entitled to benefits unless it is shown that "(A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. 921(c)(4). This provision, it should be stressed, is contained in Part *B* of the Act. Congress surely may be taken to have understood that it applied to the Part B program, even if HEW actually ignored it. The two rebuttal provisions set out in Section 411(c)(4) are almost exactly the same as the DOL rebuttal methods that the claimants challenge. Because similar provisions are not explicitly set out in the rebuttal portion of HEW's regulation, the claimants contend that Congress intended to bar DOL from authorizing

rebuttal by those mehods. But those rebuttal methods were spelled out in Part B of the Act itself.

Finally, Section 402(f)(2) was enacted in 1978, two years after this Court's decision in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In that case, the Court considered Section 411(c)(3)—the Part B provision setting out the irrebuttable presumption in favor of claimants with complicated pneumoconiosis. The Court noted that "the premise of § 411(c)(3), that the miner have a 'chronic disease of the lung,' does not explicitly provide that the disease must be one arising out of employment in a coal mine." 428 U.S. at 22 n.21. However, the Court stated, it was clear under other provisions of the Act that "an operator can be liable only for pneumoconiosis arising out of employment in a coal mine." *Ibid.* That common-sense gloss on the statute should be applied in construing Section 402(f)(2) as well. And in view of this Court's interpretation of the irrebuttable presumption two years before enactment of Section 402(f)(2), Congress must have understood at the time of enactment that coal mine operators could not be required to pay black lung benefits to claimants who were not disabled by pneumoconiosis arising from coal mine employment. Indeed, the Conference Committee expressed its intent that "all standards are to incorporate the presumptions" set out in Section 411(c). H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978).[12]

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[12] Moreover, the Congress that enacted Section 402(f)(2) also provided that DOL was to consider "all relevant evidence," including "blood gas studies, x-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history." 30 U.S.C. 923(b). The Conference Committee made clear that the provision

2. In *Turner Elkhorn Mining*, this Court also considered a constitutional challenge by coal mine operators to the limitation on rebuttal set out in Section 411(c)(4). That limitation authorizes rebuttal only by the methods that are challenged in this case. The lower court had "judged this limitation unconstitutional on the ground that it deprived an operator of a factual defense—that the miner is not 'totally disabled' due to pneumoconiosis." 428 U.S. at 35. The Court found it unnecessary to consider the due process issue because it held "as a matter of statutory construction that the § 411(c)(4) limitation on rebuttal evidence is inapplicable to operators." *Ibid.*

As the lower court decision in *Turner Elkhorn Mining* shows, a serious constitutional question would be presented if Section 402(f)(2) were construed to bar coal mine operators from proving that claimants are not entitled to benefits because they do not have pneumoconiosis or are not disabled by it. A construction of Section 402(f)(2) that preserves DOL's third and fourth rebuttal methods is therefore supported by the principle that, if at all possible, courts will construe a statute to avoid such problems. *Public Citizen* v. *United States Dep't of Justice*, 109 S. Ct. 2558, 2572 (1989); *Edward J. DeBartolo Corp.* v.

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applied to claims governed by Section 402(f)(2). H.R. Conf. Rep. No. 864, *supra*, at 16. Yet the claimants' construction of the provision leads to the result that relevant medical evidence is not considered. For example, the ALJ in Pauley's case considered ventilatory tests, blood gas studies, physical examinations, and evaluations by eight physicians (89-1714 Pet. App. 27-35) in concluding that his disability was not caused, even in part, by coal mining. The claimants contend that the ALJ should not have considered that evidence except, perhaps, insofar as it would support their claims.

Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).[23]

Because the black lung statute adjusts "the burdens and benefits of economic life," a party complaining of a due process violation must prove "that the legislature has acted in an arbitrary and irrational way." *Turner Elkhorn Mining*, 428 U.S. at 15. This test applies to laws having retrospective as well as prospective effect, but "the justifications for the latter may not suffice for the former." *Id.* at 17. Laws like this one, having retrospective effect,[24] may be upheld if they rationally "spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18.[25] However, imposing retroactive liability on employers for the benefit of employees "may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Connolly* v. *PBGC*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring) (citing, *inter alia*, *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330

[23] Contrary to the Fourth Circuit (90-114 Pet. App. 6), the Director plainly has "standing" to defend Labor's third and fourth rebuttal methods by arguing that their invalidation would raise doubts as to the constitutionality of Section 402(f)(2). Our argument with respect to the due process issue is presented in support of our statutory construction argument.

[24] Many black lung claimants (like Taylor, see 90-113 Pet. App. 6a) left coal mine work before Section 402(f)(2) was enacted in 1978.

[25] See also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 733-734 (1984) (upholding withdrawal liability provisions of Multiemployer Pension Plan Amendments Act of 1980 as a rational means of requiring employers to pay for employees' vested benefits).

(1935), in which this Court invalidated a law requiring employers to give pensions to former employees who had already been fully compensated).

When a presumption is challenged under the Due Process Clause, its validity depends "on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Mullins*, 484 U.S. at 157-158 n.30 (citation omitted). Thus, in evaluating presumptions under the black lung statute, there must be "some rational connection between the fact proved and the ultimate fact presumed." *Id.* at 159 n.32 (citation omitted).[26]

Under these standards, a substantial due process question would arise if Section 402(f)(2) were construed to prohibit coal mine operators from offering evidence to prove that a claimant is not disabled by black lung disease. A rule limiting rebuttal on the ground that such evidence is "superfluous" (90-114 Pet. App. 7 n.*) would raise a due process concern about retrospectively imposing liability on coal mine operators where there is no connection between the claimants' disability and his employment. Thus, in the present cases, where it has been decided that the claimants are not disabled as a result of their coal mine employment, serious constitutional questions would be presented if it were determined that Section 402(f)(2) requires the coal mine operators to pay black lung benefits. Those constitutional ques-

[26] Cf. *Mathews* v. *Lucas*, 427 U.S. 495, 509 (1976) (upholding conclusive presumption where relationship between presumed and proved facts is objectively probable and there is a need to avoid the burden and expense of case-by-case adjudication).

tions are avoided by our construction of Section 402(f)(2).[27]

3. The Department of Labor's interpretation of the Black Lung Benefits Act is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In light of the statute's purposes, DOL—the agency charged with its administration—permissibly construed the statute to authorize rebuttal by proof that the claimant does not have pneumoconiosis or is not disabled by it.

Indeed, heightened deference is appropriate in this case because the statute at issue is technical and complex (see *Mullins*, 484 U.S. at 138; *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984)), and because DOL's construction, made contemporaneously with the statute's enactment, represents the views of the individuals charged with "setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted)). The Department proposed its interim presumption regulation, including the third and fourth rebuttal methods, less than two months after Congress enacted Section 402(f)(2) (see 43 Fed. Reg. 17,765, 17,771 (1978)), as the method of applying the new provi-

[27] In *Sebben*, the Secretary of Labor similarly contended that constitutional questions would be presented by a holding that invalidated the third and fourth rebuttal methods. Opposing counsel in *Sebben* avoided that argument by agreeing with the Secretary that "the Act does authorize her to apply the additional rebuttal methods of the DOL interim presumption." No. 87-1095 Resp. Br. 19 n.20; see 488 U.S. at 119.

sion.[28] That contemporaneous understanding provides additional support for the common-sense conclusion that the Act does not preclude rebuttal by evidence that a claimant does not have pneumoconiosis or is not disabled by it.

CONCLUSION

The judgment of the Third Circuit in No. 89-1714 should be affirmed. The judgments of the Fourth Circuit in Nos. 90-113 and 90-114 should be reversed.

Respectfully submitted.

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[28] The Department of Labor explained in promulgating the final regulation that the rebuttal provisions satisfied Section 402(f)(2) by implementing Congress's requirement that DOL consider "all relevant evidence," and that in any case HEW did not consider its two express rebuttal provisions to be exclusive. 43 Fed. Reg. 36,826 (1978).

APPENDIX

A. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides, in relevant part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> > (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secre-

tary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

C. Section 411(c) of the Black Lung Benefits Act, 30 U.S.C. 902(c), provides:

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in

category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply

all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981.

(5) In the case of a miner who dies on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 922(a)(2) of this title, unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death. The provisions of this paragraph shall not apply with respect to claims filed on or after the day that is 180 days after the effective date of the Black Lung Benefits Amendments of 1981.

D. HEW's interim regulation, 20 C.F.R. 410.490, provides:

> *Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.*
>
> (a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the

lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, a[illegible]ith respect to a survivor of a miner wh[illegible]e January 1, 1974, when such su[illegible]les a claim for benefits, such [illegible]resumed to be totally disabled [illegible]oconiosis, or to have been totally d[illegible]ed due to pneumoconiosis at the time of death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.*

Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

E. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	or less than (mm. Hg.) Arterial pCO_2 equal to
30 or below	70
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60
Above 45	Any values.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the

survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this action shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

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